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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 979

11,000 ACRES OF LAND, MORE OR LESS, SITUATED IN SMITH COUNTY, TEXAS, GENERAL CRUDE OIL COMPANY, ET AL., OWNERS OF TRACT NO. E-419, *Petitioners,*

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

C. G. CALHOUN,
Counsel for Petitioners.

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Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, General Crude Oil Company, a corporation, and Brady P. Gentry and Carl Shamburger, pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above cause on the 21st day of December, A. D., 1945, reversing in part and affirming in part

the judgment of the District Court of the United States for the Eastern District of Texas.

Questions Presented

I

Whether land which is condemned by the United States for military purposes under provisions of the Second War Powers Act, as amended, should be valued, for the purpose of compensating the owners, at the time the declaration of taking was filed pursuant to the provisions of the Declaration of Taking Act (46 Stat. 1421-1422 c. 307, 40 U. S. C. Sec. 258a-258e), or at the time actual possession was taken by the Government.

II

Whether the owners of land which was condemned by the United States for a term of years extendable annually for an indefinite period at its option, should be limited in compensation to the annual rental value of the surface of the land, when it is shown that the oil and gas rights therein possessed a definite market value which was greatly depreciated because of the exclusive taking and possessing by the Government.

III

Whether the owner of the subsisting oil and gas lease affecting land condemned by the United States for a term of years extendable annually for an indefinite period at its option, thereby causing great depreciation in the market value of such lease at the time of taking because of the Government's exclusive possession of the land, is entitled to have full and final compensation determined in one hearing rather than in a series of separate hearings each encompassing only the damages sustained for a particular year.

Statutes Involved

(a) Title II of the Second War Powers Act of August 18, 1890, 26 Stat. 316, c. 797, as amended by the Acts of July 2, 1917, 40 Stat. 241, c. 35; April 11, 1918, 40 Stat. 518, c. 51, 50 U. S. C. Sec. 171; and March 27, 1942, 56 Stat. 176, 177, c. 199, Sec. 201, 50 U. S. C. Supp. IV, Sec. 1718.

(b) Declaration of Taking Act of February 26, 1931, 46 Stat. 1421-1422, c. 307, 40 U. S. C. Sec. 258a-258e.

Statement

Condemnation proceedings were instituted by the United States at the instance of the Secretary of War in the District Court of the United States for the Eastern District of Texas at Tyler on March 26, 1943, for the purpose of condemning 11,000 acres of land, more or less, situated in Smith County, Texas, for use as a military training center (R. 1-17). Included among such lands was a tract containing 91 acres designated as Tract No. E-419, which is owned by the petitioners Brady P. Gentry and Carl Shamburger. At the time such proceedings were filed said tract was encumbered with an oil and gas lease held by the petitioner General Crude Oil Company, which had been executed on May 10, 1937, extending for a primary term of ten years from said date, and providing for annual delay rentals in lieu of drilling operations in the sum of $1.00 per acre (R. 105).

According to the allegations in the petition for condemnation "the estate to be taken in and to said land is a term for years ending June 30, 1943, together with the right to extend said term for additional yearly periods thereafter during the existing national emergency, at the election of the Secretary of War" (R. 12). Contemporaneously with the filing of the petition for condemnation an

order was entered by Hon. Randolph Bryant, United States District Judge for the Eastern District of Texas authorizing the Government to take immediate possession of the lands described in the petition (R. 18-30). A finding was made in the judgment entered by the District Court that actual possession of the land was taken on April 1st, 1943 (R. 125).

In accordance with the provisions of the Declaration of Taking Act (Act of February 26, 1931, 40 Stat. 1421-1422, c. 307, 40 U. S. C. Sec. 258a) a declaration of taking was filed in the name of the Secretary of War on November 19, 1943, respecting the tract here under consideration (R. 57-60). Judgment was duly entered on such declaration of taking on November 27, 1943, containing the following recitations:

> "It is therefore, Ordered, Adjudged and Decreed by the Court that an estate for a term of years commencing April 1, 1943, and ending June 30, 1944, extendable for yearly periods thereafter during the existing national emergency at the election of the United States * * *" (R. 63).
>
> "was and is vested in the United States of America upon the filing of said declaration of taking and the deposit in the registry of this Court as hereinafter recited of the said sum of One Thousand, Eight Hundred Two and 50/100 ($1,802.50) Dollars; and an estate for a term of years commencing April 1, 1943, and ending June 30, 1944, extendable for yearly periods thereafter during the existing national emergency at the election of the United States * * * is deemed to have been condemned and taken for the use of the United States of America, and the right for just compensation for the same thereby vested in the persons entitled thereto, the amount of said compensation to be ascertained and awarded in this proceeding and established by judgment herein as provided by law." (R. 64)

Upon hearing before Special Commissioners appointed by the District Court to consider and determine damages resulting from the condemnation, the petitioner General Crude Oil Company, as the owner of the subsisting oil and gas lease, was awarded the sum of Eleven Thousand, Three Hundred, Seventy-five ($11,375.00) Dollars, and petitioners Gentry and Shamburger, as the owners of the fee title to the land, including the oil, gas and mineral rights therein subject to said lease, were awarded the sum of Nine Thousand, One Hundred ($9,100.00) Dollars (R. 67-68). Exceptions to the report and award of the Commissioners being taken by the Government, the matter came on for review before the United States District Court for the Eastern District of Texas, at Tyler (R. 68-69).

The undisputed evidence on the trial disclosed that the land in question is located in less than one and one-half miles of a deep test well for the discovery of oil and gas which was in process of drilling at the time of the institution of the condemnation proceeding (R. 78-79); that on April 19, 1943, the petitioner General Crude Oil Company, pursuant to due application, obtained permit from the Railroad Commission of Texas to drill a well on the tract in controversy (R. 119), but was refused permission by the War Department to enter upon the land for such purpose (R. 114); that some six producing oil wells had been drilled and completed and were producing oil in the vicinity of this land at the time of the trial (R. 81).

The contentions which these petitioners urged on the trial are summarized as follows:

> (1) That their damages should be measured by the depreciation in the market value of the property taken, which is represented by the difference between the market value of such property immediately before and immediately after the taking;

(2) That inasmuch as the taking by the Government was exclusive and prohibited the development of the land for oil and gas purposes, the market value of the oil and gas rights in the land was greatly depreciated by the taking, to the damage of both the lease owner and the land owners who had reserved an one-eighth oil, gas and mineral interest under the terms of the lease;

(3) That a declaration of taking having been filed and judgment entered thereon, as provided by the Declaration of Taking Act, the Court was required to evaluate the depreciation in market value as of the date the declaration of taking was filed.

During the trial the petitioner General Crude Oil Company, offered to prove as a basis of the damages it sustained by virtue of the condemnation the fair market value of its leasehold estate on March 26, and April 1st, and November 19, 1943, and the resulting depreciation and diminution in such value on and after such dates caused by such condemnation. However, the trial court refused to permit introduction of such evidence and limited the evidence to proof of the fair cash annual rental of the lessee's rights under the oil and gas lease, which the court found to be $1.50 per acre. Likewise the petitioners Gentry and Shamburger offered similar proof to show the depreciation in the market value of the land and oil and mineral rights therein resulting from the Government's taking, but such proof was also rejected by the trial court. Their damages were limited to the annual rental value of the surface of the land, which was fixed at $1.50 per acre (R. 85-86, 96-98, 99-100). Judgment was entered accordingly (R. 123).

An appeal was perfected by the petitioners herein to the Circuit Court of Appeals for the Fifth Circuit which reversed the judgment of the District Court as to the lease holder, General Crude Oil Company, but affirmed the judg-

ment as to the land owners, Gentry and Shamburger. The opinion of the Circuit Court is reported in 152 Fed. (2d) 566. Succinctly stated the holdings of the Circuit Court of Appeals are as follows:

> (1) The proper date for evaluating the property taken in the condemnation proceeding under consideration was the date the Government took possession of the property, to-wit, April 1, 1943, rather than the date declaration of taking was filed, being November 19, 1943;
>
> (2) The full measure of damages to which the land owners Gentry and Shamburger are entitled is the rental value of the surface of the land calculated on an annual basis and that no recovery is allowable in depreciation in the market value of the oil, gas and mineral rights in the land;
>
> (3) Whereas, the lease owner is entitled to recover the amount of depreciation in the market value of the lease resulting from the condemnation, such damages may not be ascertained fully and finally in one proceeding as of the date of the taking, but same must be determined for each year's taking separately pursuant to separate hearings relating to the damages suffered during each one year period only (R. 134-39).

While concurring in the decision of the majority in affirming the judgment of the District Court as to Gentry and Shamburger and in reversing it as to General Crude Oil Company, Circuit Judge Sibley delivered a dissenting opinion in which he disagreed with the majority holding respecting the method of determining the damages to be awarded to the lease owner on an annual piecemeal basis. Judge Sibley expressed the belief that the awarding of damages to the lease owner should be held in abeyance until such time as the lease should expire by its own terms or the land should be released by the Government, whichever be the sooner (R. 139-141).

Specification of Errors

1. The Circuit Court of Appeals erred in holding that the value of the property condemned was properly determined as of the date possession was taken by the Government;

2. The Circuit Court of Appeals erred in limiting the compensation awarded the land owners by virtue of the condemnation to the annual rental value of the surface only;

3. The Circuit Court of Appeals erred in refusing to allow the land owners to recover compensation for damages sustained to the oil and gas rights in the land condemned;

4. The Circuit Court of Appeals erred in holding that the compensation to which the owner of the oil lease affecting the condemned land is entitled must be determined in separate hearings for each year the land is taken.

Reasons for Allowance of Writ

1. The questions presented in this petition have not been settled by the Supreme Court. In fact, the questions raised herein, which relate to the measure of damages which should be awarded in proceedings of this character have not been decided previously by any appellate court in so far as we are able to ascertain. That these are questions of first impression and unusual importance is confirmed by the following statements contained in the dissenting opinion of Circuit Judge Sibley in the instant case, to-wit:

> "This case seems to be the first determined by an appellate court which deals with the measure of compensation when property is taken by the United States for a short period only but with an asserted right of renewal for annual periods during the emergency; and

the first to deal with the compensation due the owner of an oil and gas lease which is interfered with but not expressly taken. I regard it as important in both these aspects" (R. 139).

2. During the war years vast properties throughout the nation were acquisitioned by the United States under the prerogatives prescribed in the Second War Powers Act. In numerous instances, as here, the lands taken were not condemned in absolute fee, but they were taken for an indefinite period, denominated "a term for years," extendable annually at the option of the Government. Great confusion and lack of uniformity appears to have been manifested in the decisions of many of the lower courts respecting the correct method to be followed in determining the damages in such cases. Witness the decisions of District Courts in *United States* v. *9.94 Acres of Land in the City of Charleston*, 51 Fed. Supp. 478; *United States* v. *60,000 Square Feet of Land and Eight Story Hotel thereon known as Oakland Hotel*, 53 Fed. Supp. 767, and *United States* v. *Bauman*, 56 Fed. Supp. 109; wherein it is held that in proceedings similar to the one at bar the owners compensation shall not be limited to the bare rental value of the premises, but same shall comprehend every factor which evidences the deprivation to the owner. Whereas there are other decisions of District Courts which cling to the view that full compensation in this type of condemnation proceeding consists in the awarding of annual rental only. See *United States* v. *16.747 Acres of Land*, 50 Fed. Supp. 389, and *United States* v. *Certain Parcels of Land*, 55 Fed. Supp. 257.

In view of the apparent unsettled state of the law and the general importance of the subject, it is submitted that it is a matter of unusual gravity that these questions be decided by the Supreme Court for the guidance of the inferior courts in disposing of the great number of similar cases

that are either now pending or will most likely be instituted in the near future.

3. The decision of the Circuit Court of Appeals that the land owners, Gentry and Shamburger, are limited in their recovery of damages only to the rental value of the surface of the land condemned is in conflict with the decision of this Honorable Supreme Court in *United States* v. *General Motors Corporation*, 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 379, wherein it is decided that even in cases where the Government has taken only the temporary occupancy of premises, the owner's compensation may encompass other elements of damage than mere rental value, and that among other elements that should be considered is depreciation in value of the property occupied resulting from the taking.

4. The effect of the decision of the Circuit Court of Appeals is to deny to petitioners Gentry and Shamburger, the land owners, their right to that "just compensation" guaranteed to them by the Fifth Amendment to the Constitution, in that no recovery whatever is permitted them herein for the depreciated value of the oil, gas and mineral rights in the land, which unquestionably was the most substantial and valuable right affected by the condemnation.

5. The decision of the Circuit Court of Appeals that the proper date for evaluating property condemned in instances even where the procedure prescribed in the Declaration of Taking Act is followed is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *United States* v. *150.29 Acres of Land, More or Less, in Milwaukee County, Wis.*, 135 F. (2d) 878, and the decision of the Circuit Court of Appeals for the Third Circuit in *United States* v. *576.734 Acres of Land in Montgomery County, Pa.*, 143 F. (2d) 408; wherein it was expressly held that the correct date for valuing property condemned is the date the declaration of taking is filed.

6. This cause involves a construction and interpretation of a statute of the United States, to-wit, *40 U. S. C., Sec. 258a, of the Declaration of Taking Act of Feb. 26, 1931,* which expressly provides that, "upon filing of the declaration of taking and of the deposit in court • • • title to the land • • • shall vest in the United States of America and said land shall be deemed *to be condemned and taken* (emphasis ours) for the use of the United States and the right to just compensation for same shall vest in the persons entitled thereto."

In view of the well settled rule that property condemned shall be valued for compensation at the date of taking (*United States* v. *Miller,* 317 U. S. 369, 87 L. Ed. 336), it is respectfully represented that the holding of the Circuit Court of Appeals in the case at bar fixing the time for valuation at the date of actual entry is in derogation of the foregoing statute which expressly stipulates that the date of taking is the date the declaration of taking is filed.

WHEREFORE, your petitioners, referring to their accompanying brief in support of this petition, respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Honorable Supreme Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled on its docket, "11,000 ACRES OF LAND, MORE OR LESS, SITUATED IN SMITH COUNTY, TEXAS, GENERAL CRUDE OIL COMPANY, ET AL., OWNERS OF TRACT No. E-419, versus UNITED STATES OF AMERICA, No. 11,444"; and that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that your peti-

tioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

C. G. CALHOUN,
P. O. Box 629,
Tyler, Texas,
Counsel for Petitioners.

THE STATE OF TEXAS,
County of Smith:

GALLOWAY CALHOUN, being duly sworn, on oath deposes and says that he is counsel for the petitioners, General Crude Oil Company, and Brady P. Gentry and Carl Shamburger; that he has knowledge of this litigation, and that the foregoing petition and the matters therein set forth are true to the best of his knowledge, information, and belief.

C. G. CALHOUN.

Subscribed and Sworn to before me by Galloway Calhoun, this the 14th day of March, A. D., 1946.

ALICE NIBLACK,
Notary Public in and for
Smith County, Texas.
[SEAL.]

My commission expires June 1, 1947.

I do hereby certify that I have carefully examined the foregoing petition for Writ of Certiorari and the allegations thereof are true as I verily believe, and in my opinion the petition is well founded and the case is one in which the prayer of the petitioners should be granted by this Court.

C. G. CALHOUN,
P. O. Box 629,
Tyler, Texas,
Counsel for Petitioners.